No. 2686.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and
GLENN D. HART,

Appellants,

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES P. BURNS, F. S. GREEN and L. B. WALLACE,

Appellees,

vs.

W. C. HARDING LAND COMPANY, a corporation,

Appellant,

vs.

MRS. GLENN D. HART and
GLENN D. HART,

Appellees.

Reply Brief of Appellants Hart

On Appeal from the District Court of the United States for the District of Oregon.

E. A. LUNDBURG,
Solicitor for Appellants Hart.

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Counsel for appellees Adair, et al, asserts in his brief that 100 acres of the land, which was hill land, was without value; this statement is not true. In appellees' agreement for the sale of the lands it

is provided that the Land Company shall sell the hill lands at a price to average $15.00 per acre and that Lot 32, containing 2.61 acres, on which is situated a house and barn, shall be sold for at least $1,000.00. (See page 60 Record, par. 3.) The court's attention has already been directed to the fact that the appellant Harding Land Company has brought no question to this court by any assignment of error for review, and that the only questions properly brought to this court for review are those raised by appellant Hart's assignments of error. It is manifestly improper for the appellees Adair. et al, therefore, to discuss in their brief any question other than those raised by appellant Hart's assignments of error. It is therefore the contention of the appellants Hart that rescisson of the contracts in controversy having been granted by the trial court upon the issues presented by the pleadings and consideration of the evidence of witnesses before him and resulting in substantial conflict with respect to material issues should not be set aside on appeal, and further that this court cannot reconsider such conflicting evidence upon any question before the lower court not brought to this court for review by any valid assignment of error, which fact has been clearly demonstrated to this court in the brief of the appellees Hart.

There is only one question before this court for review and that is the responsibility of the land owners, appellees Adair, et al, for the return of the money paid under each of the contracts rescinded for the fraud of their sales agent, the Harding Land Company, and this is to be determined by the construction placed upon the agreement for the sale of

the land between the owners and the Land Company, to which the court's attention has already been called. Counsel Eddy in his argument to the court gave much of his time to a discussion of Mr. Hart's connection with the Land Company as a stockholder and officer subsequent to the time he and his wife purchased tracts, all of which facts were consdered by the lower court in reaching its decision, and are not open to review on any question brought to this court on appeal.

The only fortunate feature of Mr. Hart's connection with the Land Company was his inability to pay the notes he gave for stock in the Land Company and was thereby saved from being swindled out of $5,000.00.

Several questions have been set out and discussed in appellees' brief, which are mere repetition of similar propositions advanced in the reply brief of the Land Company. We will briefly note the same and discuss their application to the questions before the court in the order in which they appear in appellees' brief.

POINTS OF LAW AND AUTHORITIES.

I.

Ratification is a matter to be pleaded as a defense and established by proof, that it need not be negatived by the bill, but to be available is a matter of defense which must be pleaded. Where it does not affirmatively appear from the allegations of the bill that the complainant has been guilty of laches, nor that it has done anything to condone the frauds complained of or to ratify the contract alleged to be fraudulent, any such fact must be

pleaded and established by proof.

Northern Pacific R. R. Co. v. Kindred, 14 Fed. 77.

State v. Ruff, 6 Ind. A. 38, 33 N. E. 124.

II.

When the owners authorized the Land Company to make contracts of sale in its own name for the sale of their land, they knew in conferring such power that the corporation could not act personally, but that in performing the engagement it would act through its agents, who for that purpose are its faculties, and whose acts are the acts of the corporation, and that the relation between it and its instrumentalities are as one being, or artificial person, and involves no delegation of power.

Killingsworth v. Portland Trust Co., 18 Ore. 351, 23 Pac. 66, 7 L. R. A. 638.

III.

Where an agent is employed to sell certain land, the principal is responsible for his false representations as to the land, although the agent is not authorized to make them, and although the principal has no knowledge of them until after the sale is completed.

2 Corpus Juris, Sec. 541, Pages 855-6.
Wolfe v. Pugh, 101 Ind. 293.
Haskell v. Starbird, 152 Mass. 177.

IV.

It was alleged and proved that the owners accepted the contracts in controversy including "planting and cultivating agreement," and they

therefore ratified the contracts and became bound thereby.

2 Corpus Juris, Sec. 640, Page 917.
2 Corpus Juris, Sec. 99, Page 481.

V.

The owners of the land having selected the land for the sole and single purpose of its "exploitation and sale as orchard land," and having intrusted it for such purpose to the Land Company with authority to sell and make contracts of sale in its own name **"as orchard land,"** must be held to make full restitution for the fraud thus committed within the scope of the agent's authority.

2 Corpus Juris, Sec. 534, Page 849.
2 Corpus Juris, Note (a), Page 850.
McIntire v. Pryor, 173 U. S. 38, 19 S. Ct. 352.
Alger v. Keith, 105 Fed. 105.
Alger v. Anderson, 78 Fed. 729.

VI.

Under the assignments of two of the contracts in controversy the appellants acquired all of the rights of their assignors therein, and the assignment carries with it the right to employ any remedy which is open to the assignor.

Dahms v. Sears, 13 Ore. 47, 11 Pac. 891.
Sperry v. Stennick, 64 Ore. 96; 129 Pac. 130.
Secs. 378 and 379, Title V, Chap. VI, Lord's Oregon Laws.
Sec. 484, Title VI, Chap. VII, Lord's Oregon Laws.
Barker v. Ladd, Fed. Cases 990, 3 Saw. 44.
Com. S. S. Co. v. Am. Ship. Bldg. Co., 197 Fed. 780 at 795.

VII.

Under the Oregon law a seal affixed to writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing suits or actions thereon.

Sec. 776, Title 9, Chap. 7, Lord's Oregon Laws.

Olston v. Oregon Water Power Co., 52 Ore. 357 at 358.

Streeter v. Janu (Minn.), 96 N. W. 1128.

Montgomery v. Dresher (Nebr.), 134 N. W. 251.

VIII.

In the federal courts the jurisdictional amount in controversy is the aggregate amount prayed for.

Chase v. Roller Mills Co., 56 Fed. 625.

Bowden v. Burnham, 56 Fed. 752.

Heffner v. Gwynne T. C. Co., 160 Fed. 635.

ARGUMENT.

I.

Counsel for appellees has gone to much trouble to state the law and cite cases in support thereof under Points and Authorities on pages 3, 4 and 5 of his brief on the question of ratification, waiver, laches, all of which we submit have no application to any question before this court for review under an assignment of error.

Appellees are not in this court upon any assignment of error other than those of the appellants Hart, and the lower court upon consideration of the facts presented under the issues formed by the

pleadings determined that there had been no ratification of the contracts as alleged in the answers of either the Land Company or the appellees.

Further than this neither the Land Company nor the appellees pleaded any defense of laches or waiver in the lower court, and under any circumstance any such fact must be pleaded and established by proof to be available.

Northern Pac. R. R. Co. v. Kindred, 14 Fed. 77.

II.

Appellees contend that because the contracts in controversy were secured by the sales manager or agent of the Land Company that the power to make such a sale cannot be delegated without the authority of the land owners. In the case of Killingsworth v. Portland Trust Co., of Oregon, 18 Ore. 35, Lord Justice held, "When a corporation is made the agent to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being or artificial person and involves no delegation of power * * * so that a person conferring upon a corporation such power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person, as instrumentalities authorized by him to do the act conferred by his power of attorney."

III.

The Land Company was not restricted in its power to make a sale, the appellees not alone authorized the Land Company to sell the particular land but to "exploit and sell" it as orchard land, and to enter into contracts of sale in "its own name" with purchasers, and the statement of law which counsel cites from 2 C. J. Sec. 251, page 616, and cases cited therewith in his brief, clearly have no application. The case of Samson v. Beale, 27 Wash. 557, one of the cases cited, is a case where the agent having authority to collect rents and remit same and look after repairs of property also was authorized to find a purchaser but could not make a sale without first submitting offer to owners, thus his power to sell was restricted, and the owners were not liable for his representations. The case of Mays v. Wahlgreen, 9 Colo. A. 506, was not a case of agency at all. The true rule to be applied to the case at bar is found in 2 C. J. Sec. 541, pages 655-6, to-wit: "Where an agent in negotiating a transaction or making a contract on behalf of his principal makes representations, declarations and admissions, in connection therewith respecting the subject matter, they will be binding on the principal where they are false and fraudulent, made without the principal's knowledge, and constitute a breach of trust against the principal." Also the case of Wolf v. Pugh, 101 Ind. 293, it was held, "Where an agent is employed to sell certain land, the principal is responsible for his false representations as to the land, although the agent is not authorized to make them, and although the principal has no knowledge of them until after the sale is completed." To like effect is the case of Haskell v.

Starbird, 152 Mass. 117, 25 N. E. 14.

IV.

All of the facts showing the relation between the appellees and the Land Company, including the contract made with the Land Company by the owners were fully pleaded in the bill of complaint, and while under the original contract for the "exploitation and sale of the tracts as orchard land" it was the evident purpose "to plant and care for the tracts where the purchasers desired," yet when the owners under the supplemental contract accepted the sale contracts including the "planting and cultivation agreement" they thereby ratified the contracts so made and became bound thereby. These facts have already been called to the attention of the court in our former brief and Counsel Eddy in his brief and upon his oral argument to the court seeks to avoid the consequences of this fact, by contending "that appellees cannot be charged as having ratified the contracts in question because it appears that they had no knowledge of the alleged representations prior to the filing of suit." (See par. X, page 7, of Appellees' Brief.)

That the ratification was sufficiently pleaded and proven, see 2 C. J. Sec. 640, page 917, which says, "Proof of ratification includes proof of agency and authority, and although it has been held that ratification must be pleaded in order to be shown, it may be shown under a complaint charging the ratified act to be the act of the principal, or under an averment in the pleading that the agent acted by due authority."

Granting for the sake of argument that the Land Company was not in the first instance authorized to include the "planting and cultivation agreement," yet all the other features of the contract were in fact authorized, what is the legal effect when the appellees accepted the contracts including the "planting, etc.," feature? The rule is well stated in 2 C. J. Sec. 99, page 481, to-wit: "Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf, he cannot without the consent of the other party to the transaction, ratify in part or repudiate in part, he either must repudiate or ratify the whole transaction. He cannot ratify that part which is beneficial to himself and reject the remainder, but with the benefits he must take the burdens, nor can he make the ratification conditional upon the suffering no loss * * * he cannot ratify without becoming bound by the representations and warranties and all other instrumentalities employed by the agent as an inducement to bring about the contract."

V.

Counsel for appellees contend that the owners should not be held liable for anything more than the money actually paid to them, and cites the case of Daniel v. Mitchell, 1 Story 172. Fed. Cases No. 3562, and Mason v. Crosby, 1 Woodb. & M., 342 Fed. Case No. 9234, in support of his contention. In the Daniel v. Mitchell case the contract of sale was rescinded on the ground of mutual mistake, there were several owners of the lands sold and each who had received any portion of the money or notes had

to return the same, but Daniel, to whom the land had been deeded, was ordered to reconvey when he had been repaid in full. In the Mason v. Crosby case all of the parties who owned interests in the land sold were not made parties to the bill and under the facts ascertained the court after handing down his opinion referred the case to a master to report on details of the deal. It appears that the contract sought to be rescinded was made in 1835, the fraud was discovered in the fall of 1836 and suit was not brought until August, 1841, and it was upon this point that the court in considering the master's report to determine the extent of the liability of the defendants the court (see Mason v. Crosby, Fed. Case No. 9235, page 1028), says, "The legal title to the land was in the defendants, and the deed was executed by them. But by an agreement between the parties concerned in the speculation. these two defendants were to have but one-sixth each of the interest in the purchase of Smith. Two-thirds was in several other persons, and this was known soon after, if not at the time when the bargain was completed. The money which was paid was distributed among the parties in proportion to the interest they had under this agreement. These persons should properly have been made parties, and if not known when the original bill was filed, should have been brought into the case by a supplemental bill. As this has not been done, the decree cannot affect their rights. Still, as Crosby and Brastow held the whole legal title, and were ostensibly the sole contracting parties, they might, perhaps, if the suit had been commenced as soon as the fraud was discovered, have been held for the whole and left to seek contributions among the

other parties in interest." Thus it is clearly seen that laches alone prevented a full recovery against the defendants.

The rule is stated in 2 C. J., page 849, Sec. 534, under title "Fraud, acts of fraud by the agent committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts, and although he derives no benefit from the success of the fraud."

This is the rule sustained in the case of McIntire v. Pryor, 173 U. S. 38, 19 S. Ct. 352, see also note (a) 2 C. J., page 850. To like effect are the holdings in the case of Alger v. Keith, 105 Fed. 105, and Alger v. Anderson, 78 Fed. 729, 735.

Counsel for appellees referring to the case of Alger v. Keith, supra, which we cited in our prior brief, seeks to create the impression that Anderson, owner of the land, was held to full restitution because he personally made false representations as to the land, and cites the court's attention to the opinion at page 113. A reading of the opinion will disclose no such fact. And the reason Gonce was not held liable was because he was not concerned in the sale of the lands to Alger, but in fact had given Anderson an option on certain lands owned by him and had at Anderson's request delivered title to Alger by placing a deed in escrow to be delivered upon payment of the purchase price.

VI.

Both counsel for the owners and the Land Company have cited and quoted at length from the

opinion in the case of Cooper v. Hillsboro Garden Tracts (Ore.), 152 Pac. 488. We are not concerned with the facts nor the application of the law to the facts in the Cooper case, nor is this court trying the Cooper case.

In the case at bar the lower court granted a rescission of the contracts held by the appellants and on all of the defenses tendered on the question as to whether there had in fact been a ratification of the contracts in controversy, the court upon a consideration of all the facts held that there had been no ratification and the findings of the lower court on the question of ratification has not been brought to this court by any assignment of error for review and is therefore not before this court for consideration.

Under the law let us then determine what effect the assignments of the two contracts to appellants had upon their right to maintain a suit for rescission thereof and to recover the payments made thereunder.

Under the bill of complaint it was alleged and this fact was not controverted by either the answer of the Land Company or the appellees that for a valuable consideration the appellant acquired all of the rights of property under the two assigned contracts. (See Record, pages 12 and 13.) An examination of such assignments will disclose that the entire rights of property under each contract was conveyed by the assignments and not merely the right to litigate.

As to Mr. Hart's contract, which he assigned

to his wife, he has testified (see Record, page 91) in relation to the tract purchased by him that "The money used in the purchase of this tract belonged to my wife and the payments made afterwards were made with her money and that is an explanation of my assigning this contract over to her." So much for the character of the assignments.

Appellants contend that having acquired all of the rights of their assignors in and to the contracts assigned that such assignments carry with it the right to employ any remedy which was open to the assignor.

The contracts assigned are Oregon contracts and the rights and liabilities arising thereunder are to be construed in accordance with the laws of Oregon. Accordingly, the question whether the assignment of the respective contracts conferred upon the appellants the right to maintain this suit must be decided according to the laws of Oregon.

This question should have been raised in the lower court by defendants filing a demurrer to the Bill of Complaint. This, however, was not done and upon a trial of the case on its merits the lower court after hearing all the evidence, entered its decree granting a rescission of the contracts in controversy.

What then is the legal effect of the assignments of the controversy under the allegations of the bill of complaint?

In the case of Dahms v. Sears, 13 Ore. 47, 58, it was held that, "if the wrongful act is of such a

character that the damages resulting therefrom, upon the death of the person injured, survive to his personal representatives, the right of action is assignable. A wrong committed upon a person resulting in damages by reason of assault and battery, breach of promise of marriage, etc., are causes which do not survive the death of the injured party and are therefore not assignable." This was the test applied by the Supreme Court of Oregon in the case of Sperry v. Stennick, 64 Ore. 96, in which case it appears that a corporation had secured a contract for the purchase of land, which contract was thereafter assigned for a valuable consideration to the plaintiffs. The vendors had made false representations which had induced the assignor to make the contract. The plaintiff as assignee brought an action to recover the money paid by the assignor corporation under the contract. The lower court refused to receive any evidence of the false representations and gave judgment of non-suit after the plaintiffs had introduced their evidence, which the court refused to permit to go to the jury.

The supreme court reversed the decision of the lower court and held that action was one which would survive and was therefore assignable and the assignment of the contract for a valuable consideration gave to the assignee the right to pursue any remedy to recover the money paid under the contract induced by fraud which the assignor might have pursued.

Let us now determine what causes of action or suit survive under the laws of Oregon.

Secs. 378 and 379, Title V, Chap. VI, Lord's Ore-

gon Laws, are as follows:

Sec. 378. What causes of action do not survive: A cause of action arising out of an injury to the person, dies with the person of either party, except as provided in section 380. (Sec. 380 provides that where the death of a person is caused by wrongful act or omission of another that the personal representative may recover in an action at law not to exceed $7,500.00.)

Sec. 379. What causes of action do survive: "All other causes of action, by one person against another, whether arising on contract or otherwise, survive to the personal representative of the former and against the personal representatives of the latter."

Sec. 484, Title VI, Chap. VII, Lord's Oregon Laws, provides among other things, "All causes of suit by one person against another, however arising, survive to the personal representatives of the former and against the personal representatives of the latter."

In the case of Barker v. Ladd, Fed. Cases No. 990, 3 Saw. 44, which was an action for damages for misrepresentations of defendants inducing the sale of corporate stock, the plaintiff died and his administrator sought to continue the action, the court held in construing Secs. 365 and 366 of the Oregon Code (now Secs. 378 and 379 Lord's Oregon Laws) that the cause of action survived and that the law of the state furnishes the rule for the federal court.

It is apparent therefore that one having a cause of suit to secure the rescission of a contract on the

ground of fraud that under Secs. 379 or 484, Lord's Oregon Laws, the same would survive to his personal representatives **and would therefore be assignable.**

In the case of Com. S. S. Co. v. Am. Ship Bldg. Co., 197 Fed. 780, the plaintiff, a corporation, sought to secure the rescission of a contract as assignee thereof on the ground of fraud perpetrated on the assignor inducing the making of the contract and to recover the money and property its assignor parted with under the contract. Defendants demurred to the complaint, and asserted that the right to rescission was personal to the assignor and did not pass with the assignment of the contract. The court in its opinion overruling the demurrer, in part says:

"The Ohio law recognizes that a chose in action which is transmissible to an executor or administrator under the law of Ohio is assignable in equity. Grant v. Ludlow, 8 Ohio St. 1. And that survivability and assignability of things in action are convertible terms. The Village of Cardington v. Fredricks, 46 Ohio St. 442, 448, 21 N. E. 766; Cincinnati v. Hafer, 49 Ohio St. 60, 66, 30 N. E. 197.

"The Ohio law being that all causes of action which are survivable are assignable, it is important to determine whether the cause of action herein involved, namely a cause of action for deceit or fraud, survives.

"Section 11,235 of the General Code of Ohio, formerly section 4975 of the Rev. Stats. of Ohio, provides:

" 'In addition to the causes which survive at common law, causes of action for mesne profits, or injuries to the persons or property, or for deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto.'

"This section states, as will be observed, that causes of action for 'Mesne profits, or injuries to the person or property, or for deceit or fraud,' are survivable actions. If any action for deceit or fraud is a survivable action in Ohio, it is an assignable cause of action for the purposes of this inquiry.

"What constitutes fraud has been ably considered by Chief Justice Fuller, in delivering the opinion of the supreme court in the case of Moore v. Crawford, 130 U. S. 128, 9 Sup. Ct. 448, 32 L. Ed. 878. The Chief Justice said:

" 'Fraud indeed, in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done.'

"Considering the provisions of the Ohio statute and the language of this opinion, in my opinion the fraudulent acts complained of in the bills herein

are plainly within the contemplation of the provisions of the Ohio statute.

"The bills which have been demurred to in cases Nos. 8,214 and 8,215 endeavor to make a cause of action for a rescission for fraud, by reason of assignment, the basis of the actions instituted. In view of the statute and the supreme court decision I have referred to, I am of the opinion that such a cause of action is contemplated. This seems to be also the opinion held by the courts of Ohio in the case of Isham v. Buckeye Stave Co., 25 Ohio Cir. Ct. R. 167, and affirmed without report in 72 Ohio St. 660, 76 N. E. 1126. This was an action for the rescission of a contract for the sale of growing timber for fraud inducing the making of said contract, which fraud was not discovered by the decedent in his lifetime. The court held that there was no question but that the cause of action survived to the personal representative and not to the devisee, and this was their conclusion, inasmuch as the subject-matter of the contract was personal property.

"If a cause of action for fraud is assignable, surely the remedy of redressing the wrong passes. It is certainly within the contemplation of all rules of equity that the remedies for the redressing of the wrong must pass with the cause of action. The remedy surviving with the cause of action, the assignee of the cause of action has the right to elect between remedies. The election is not personal, but passes with the cause of action. This doctrine was approved by the court of appeals of this jurisdiction in the recent case of Berry v. Chase, 179

Fed. 427, 102 C. C. A. 573, Judge Knappen, delivering the opinion of the court, holding:

" 'The owner of a debt upon which he had the right to sue a principal or his agent through whom the debt was contracted, the principal being then undisclosed, in assigning the debt may also transfer to the assignee such right of election.'

"In this opinion the case of Reeder Bros. Shoe Co. v. Prylinski, 102 Mich. 468, 471, 60 N. W. 969, was cited with approval; that case holding that the assignee of a vendor's account for goods sold could, upon discovery of the fraud inducing the sale, rescind the same and recover the goods sold.

"Inasmuch as the Ohio law permits the survivability and assignability of causes of action for fraud, cases from other jurisdictions where the basic law is otherwise are of no importance in connection with these demurrers. A cause of action for fraud may be a valuable asset, and, as the assets of the steamship company originally formed were disposed of to the complainant herein, it would follow that this cause of action, based upon fraud, together with its remedies, passed to the complainant.

"That this chose in action is recognized as property is evident from the opinion of Judge Spear in the case of Reece v. Kyle, 49 Ohio St. 475, 484, 31 N. E. 747, 750 (16 L. R. A. 723). The judge says:

" 'It is difficult at best to reconcile the strict law of maintenance and champerty with our ideas of the rights of property, and the right of the citi-

zen to contract. Among the fundamental rights is the right to acquire, possess, and dispose of property. The right of disposition necessarily inheres in the right of ownership. We are taught that a chose in action is as much property as a thing in possession, and that in this day the right to dispose of such property is as high and free from doubt as is the right to sell the horse, or farm, of which the seller has manual possession.'

"This being the attitude of the highest court of the State of Ohio, and the obligation resting upon me to follow the law of Ohio in respect to the question of assignability, it seems plain to me that this action for fraud is assignable, having survivablity, and with the assignment of the cause of action carries with it the remedy of rescission."

VII.

Counsel for appellees contend also that the fact that the contracts of sale were in writing and under seal and did not contain the names of the appellees that they cannot be held as undisclosed principals upon a contract under seal executed by an agent in his own name and cites many authorities to uphold that contention.

This effect of this rule has been abrogated by statute in the State of Oregon.

Sec. 776, Title 9 Chap. 7, Lord's Oregon Laws, provides: "The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may

therefore be modified or discharged by a writing not under seal, or by an oral agreement otherwise valid."

In the case of Olston v. Oregon Water Power Co., 52 Ore. 343, the Supreme Court of the State of Oregon was called upon to construe Sec. 776, Lord's Oregon Laws, held "the effect of the seal by our statute, being only prima facie evidence of the consideration, gives to a sealed instrument no greater significance than to one unsealed which expresses the consideration on its face, and either may be attacked at law for fraud in the consideration as well as for fraud in its execution," (see page 353) and (see page 357), "it is deprived of the solemnity formerly ascribed to it by reason of the seal," and (see page 358) * * * "reduced sealed instruments to the footing of simple contracts that express consideration."

It is clear from the foregoing that in Oregon the distinction between sealed and unsealed instruments, recognized at common law has been abolished by statute.

In the case of Streeter v. Janu (Minn.), 96 N. W. 1128, which was as stated by the court, "an action by a vendor to enforce payment of an amount due in accordance with the terms of a written executory contract for the purchase and conveyance of real estate. The defendant was not named in the contract nor did he execute it. The claim is that the person named in the instrument as vendee was simply acting as defendant's agent when he made the purchase and executed the contract. It stands admitted that plaintiff had no knowledge

until long afterwards. The contract was under seal. The lower court on motion of defendant's counsel at the close of plaintiff's testimony instructed the jury to return a verdict for defendant."

In the Supreme Court defendant contended that the contract being one under seal, an undisclosed principal cannot be bound or held by its terms. The court held, "The common law rule in respect to the liability of an undisclosed principal is concisely stated in 1 Amer. & Eng. Ency. Pl. & Pr. (2nd Ed.) 1139, etc., and cases are cited which fully support the text. From these citations it appears that, if this instrument were but a simple contract, the right to pursue the undisclosed principal is absolute and unrestricted. If on the other hand the common law distinction between sealed and unsealed instruments remains, and it is a specialty, an undisclosed principal cannot be shown or held liable. No one but the party signing it can be bound by it. But the distinction between sealed and unsealed private writings has been abrogated by Laws 1899, p. 88, C. 86, whereby the use of private seals has been abolished, and it is expressly declared that the addition of a private seal in writing **'shall not affect its character in any respect.'** The result of this legislation is that all differences between simple contracts and specialties, executed by private parties * * * are discarded. With the distinction abolished it follows that testimony tending to show that the act of the alleged agent was within the limits of the power delegated, and that defendant was an undisclosed principal was competent."

Montgomery v. Dresher (Nebr.), 134 N. W. 251, Reese, C. J., in his opinion, says: "Since the use of private seals has been abolished (Ann. St. 1911 Sec. 11, 851) all contracts are upon the same footing as simple contracts. Therefore the same rule should be applied to all."

From the foregoing decisions and in view of effect of Sec. 776 of Lord's Oregon Laws reducing instruments under seal to the plane of simple contracts reciting a consideration, it is evident that whether the contracts are under seal or not would not avail the appellees to avoid liability as undisclosed principals.

VIII.

Counsel for appellees upon the assumption that there can be no recovery upon the assigned contracts that the appellants claim would be reduced to less than that required amount to give this court jurisdiction, state that it is incumbent upon this court to dismiss the case.

This is an idle assumption. Appellants in the lower court secured a judgment against the Land Company for an amount largely in excess of the jurisdictional amount.

In the federal courts the jurisdictional amount in controversy is the aggregate amount prayed for.

Chase v. Roller Mills Co., 56 Fed. 625.
Bowden v. Burnham, 56 Fed. 752.
Heffner v. Gwynne, T. C. Co., 160 Fed. 635.

CONCLUSION.

We will not tire the court with a needless re-

sume of the questions before it on appeal.

The appellants Harding Land Company have brought no question to this court for review under so-called assignments of error, which are not in conformity with the requirements of Rule 11 of this court.

The only questions for review properly before this court arise under appellants Hart assignments of error.

It may be fairly insisted that this court upon a consideration of the questions before it for review and the application of the law thereto that not only should the decree of the lower court be affirmed, but that said decree should be modified to the extent of including a judgment against the land owners for the return of the money paid under each of the contracts rescinded.

The very character of the land purchased by the appellees and which they placed with the Land Company for its **"exploitation and sale as orchard land"** was a manifest fraud upon any purchaser thereof and one for which the appellees were primarily responsible. Green, one of the owners, had supervision of the planting and cultivation of the tracts sold. Wallace, another of the owners, was stockholder and secretary of the Land Company, during the period this land was being sold; all of the owners except Wallace were farmers and lived in the immediate vicinity of the tracts in controversy, and it would be necessary to close our eyes to evident facts to contend that the owners were honest in their efforts to market the land for orch-

ard purposes, and not know its utter lack of utility for such purpose. It was they who set the **"mischief afoot,"** it is they who actuated by **"greed for large profits,"** and not by sober-minded honesty, have been **"part and parcel"** of the fraud committed in securing the contracts in controversy.

Under the law of Oregon the lower court was certainly not justified in refusing to hold the appellees responsible as **"undisclosed principals"** because the contracts were signed by the Land Company and its corporate seal affixed.

Because of such a seal this court could not say that under the contracts issued the owners could not have been compelled to execute a conveyance, how then can it be said that the owners are not liable as undisclosed principals for the return of the money upon a rescission?

E. A. LUNDBURG,
Respectfully submitted,
Solicitor for Appellants Hart.